(4)

No. 88-1128

Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ANTONE FOLKINS, et al.,

Respondents.

On Writ of Certiorari to the California Supreme Court

OPPOSITION OF KENNETH MATTZ TO PETITION FOR WRIT OF CERTIORARI

ALEXANDER & KARSHMER
GEORGE FORMAN
Counsel of Record
1900 Addison Street
Suite 200
Berkeley, California 94704
(415) 841-5056
Attorneys for Respondent
Kenneth Mattz

78p

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

APPLICABLE FEDERAL LAWS 1

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE 10

ARGUMENT 25

I. THE PETITION SHOULD BE DENIED BECAUSE IT IS UNTIMELY. 25

II. GRANTING THE PETITION IS NEITHER NECESSARY NOR APPROPRIATE 32

A. The California Supreme Court Correctly Held that Petitioner is Barred by the Doctrine of Res Judicata/Collateral Estoppel from Relitigating the Existence of the Federally-Reserved Fishing Rights of the Indians of the Reservation. 32

B. The California Supreme Court Correctly Rejected on the Merits Petitioner's Argument that the "Equal Footing Doctrine" Precludes the Existence of the Fishing Rights of the

Indians of the Hoopa Valley Reservation. 39

C. The Circumstances Surrounding the Creation of the Reservation Indicate that the Reservation Includes the Klamath River. 46

CONCLUSION 49

TABLE OF AUTHORITIES

Page

Cases

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 44

Allen v. McCurry, 449 U.S. 90 (1980) . . 38

Arizona v. California, 373 U.S. 546, 598 (1963), decree entered, 376 U.S. 340 (1964), modified, 439 U.S. 419 (1979), further modified, 460 U.S. 605 (1983) . . 43, 44, 49

Arnett v. 5 Gill Nets, 48 Cal.App.3d 454, cert. den. 425 U.S. 907 (1974) . 11, 13, 14, 31, 35, 48

Bernhard v. Bank of America, 19 Cal.2d 807 (1942) 38

Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981) 13, 16, 31, 35, 40, 47

Buck v. Superior Court, 245 Cal.App.2d 431 (1966) 17, 18, 28

Camfield v. United States, 167 U.S. 518 (1867) 41

Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973) . . 14

Donahue v. Justice Court, 15 Cal.App.3d 557 (1971) 30, 31, 36

Donnelly v. United States, 228 U.S. 213, reh. den., 228 U.S. 708 (1913) . 16, 31, 36, 37, 47

Douglas v. Seacost Products, Inc., 431 U.S. 265, 284 (1977) 45

Elser v. Gill Net No. 1, 246 Cal.App.2d 30 (1966) 11, 30, 36

Heflin v. United States, 358 U.S. 415, 416 (n.7) (1959) 29

Hughes v. Oklahoma, 441 U.S. 322 (1980) . 41, 45

In re Torres, 128 Cal.App.3d 826 (1982) . 28

Kleppe v. New Mexico, 426 U.S. 529 (1976) 41

Mattz v. Arnett, 412 U.S. 481 (1973) . . 12, 31, 38, 48

McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430 (1939) 18

Menominee Tribe v. United States, 391 U.S. 404 (1968) 43

Mesaris v. Superior Court, 4 Cal.App.3d 976 (1970) 16, 18, 28

Minnesota v. Block, 660 F.2d 1240 (8th cir., 1981), cert. den., 455 U.S. 1007 . 41, 44

Montana v. United States (1981) 450 U.S. 544 47

Morton v. Mancari, 417 U.S. 535, 555 (1974) 42

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 44

Pacific Coast Federation of Fishermen's Ass'n. v. Sect'y. of Commerce, 494 F.Supp. 626 (N.D. Calif. 1980) . 13, 31, 35, 48

Pacific Mutual Life Ins. Co. of Calif. v. McConnell, 44 Cal.App.2d 715 (1955) . 39

People v. Crudginton, 88 Cal.App.3d 295 (1979) 17

People v. McCovey, 36 Cal.3d 517, cert. den. 469 U.S. 1062 (1984), S.Ct. No. 84-453 . . . . 9, 10, 12-14, 20, 21, 27, 31, 34-37, 39

People v. McCovey, 145 Cal.App.3d 190 (1984) 27

People v. McKee, 267 Cal.App.2d 509 (1969) 17, 18, 29

People v. Taylor, 250 Cal.App.2d 367 (1967) 17, 18, 29

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. den. 429 U.S. 1038 31

Toomer v. Witsell, 334 U.S. 385, 402 (1948) 45

U.S. v. North Dakota, 650 F.2d 911 (8th Cir. 1981); affirmed, 458 U.S. 1129 (1983) 43

United States v. Brown, 552 F.2d 817 (8th Cir. 1977), cert. den., 431 U.S. 949 . . 42, 44

United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986) 13, 31, 35, 36

United States v. Hells Canyon Guide Service, Inc., 660 F.2d 735 (9th Cir. 1981) 44

United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865) 41

United States v. Kagama, 117 U.S. 375 (1986) 41, 46

United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979) 42, 44

United States v. San Francisco, 310 U.S. 16 (1940) 42

United States v. Wilson, 611 F.Supp. 813 (N.D. Calif. 1985) 34

Vanguard Recording Society v. Fantasy Records, Inc. 24 Cal.App.3d 410 (1972) . 39

Washington v. Fishing Vessels Ass'n., 443 U.S. 658 (1979) 44

Statutes, Regulations and Constitution

16 U.S.C. §3372(a)k 23

18 U.S.C. §1182 12

25 C.F.R. Part 250 23

28 U.S.C. §1360 12

28 U.S.C. §2101(c) 25

42 Fed.Reg. 40904-5 (Aug. 12, 1977) . 13

43 Fed.Reg. 30047-53 (July 13, 1978) . . 13

44 Fed.Reg. 17144-17151 (March 20, 1979) 13

46 Fed.Reg. 56057-8 (Nov. 13, 1981) . 14

52 Fed.Reg. 27329-35 (July 16, 1987) . . 14, 23

Act of April 13, 1864 (13 Stat. 39) . . 5

Act of March 3, 1852 (10 Stat. 3) . . . 1

Act of March 3, 1855 (10 Stat. 699) . . 3

California Penal Code §871.5 27

California Penal Code §999a . . . 28, 29

Executive Order of June 23, 1876 . . . 8

Executive Order of November 16, 1855 . 5

Executive Order of October 16, 1891 . . 1

Supreme Court Rule 20.1 . . . . . 25, 29

United States Constitution, Article VI, Cl. 2 . . . . . 12, 43

United States Constitution, Article I, §8, Cl. 3 41

United States Constitution, Article IV, §3, Cl. 2 41

No. 88-1128

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1988

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ANTONE FOLKINS, et al.,

Respondents.

On Writ of Certiorari to the California Supreme Court

OPPOSITION OF KENNETH MATTZ TO PETITION FOR WRIT OF CERTIORARI

OPPOSITION OF KENNETH MATTZ TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Petition omitted the decision of the committing magistrate granting Respondents' motion to dismiss at the conclusion of the preliminary hearing. That decision is reprinted as Appendix A, p. A-1.

APPLICABLE FEDERAL LAWS

The Petition lists only the Presidential Executive Order of October 16, 1891, as the federal law applicable to this case. In fact, the portions of the following federal statutes and Executive Orders quoted below also are applicable:

Act of March 3, 1852 (10 Stat. 3):

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the sixth section of an act approved May sixth,

eighteen hundred and twenty-two, entitled "An act to amend an act entitled An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved the thirtieth March, eighteen hundred and two;" also, the fifth section of an act approved May twenty-fifth, eighteen hundred and twenty-four, entitled "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," be and the same hereby are revived, and extended to the State of California, for the purpose of establishing a superintendency of Indian affairs for said State, and that the President, by and with the advice and consent of the Senate, be, and he hereby is authorized to appoint a superintendent of Indian Affairs to reside in said State, who shall possess the same powers, and be subject to the same duties within his superintendency as belong to the Superintendent of Indian Affairs at St. Louis, in the State of Missouri, with the power also of exercising administrative examination over all claims, and accounts and vouchers for disbursements, connected with Indian affairs in the said State of California, which shall be transmitted to the Commissioner of Indian

Affairs for final adjudication, and by him passed to the proper accounting officers of the treasury for settlement.

* * *

Act of March 3, 1855 (10 Stat. 699):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they hereby are, appropriated, out of any money in the treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes.

* * *

For the general incidental expenses of the Indian service in California, embracing expenses of travel of the superintendent and agents, twenty-eight thousand eight hundred and fifty dollars;

For the pay of physicians, smith, carpenters, and agricultural and mechanical laborers, on the reservations in California, fifty-four thousand three hundred dollars;

For defraying the expenses of the removal and subsistence of Indians in California, to

three military reservations, in accordance with the plan submitted by the superintendent of Indian affairs of that State, and approved by the President, one hundred and twenty-five thousand dollars. Provided, That the superintendent of Indian affairs in that State be authorized, should he deem it expedient, to expend an amount not exceeding twenty thousand dollars of the sum herein appropriated, to relieve the temporary wants of the Indians outside of the reservations;

* * *

For collecting, removing, and subsisting the Indians of California (as provided by law,) on two additional military reservations, to be selected as heretofore, and not to contain exceeding twenty-five thousand acres each, in or near the State of California, the sum of one hundred and fifty thousand dollars: Provided, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for, and shall not expend the amount herein appropriated unless, in his opinion, the same shall be expedient; and the last proviso to the authority for five military reservations in California, per act of third of March,

eighteen hundred and fifty-three, be, and the same is hereby, repealed: Provided, That so much of the act approved on the thirty-first day of July last, as required that no more than twenty thousand dollars shall be drawn by the Superintendent of Indian Affairs, or in his hands expended at one and the same time, be, and the same is hereby, repealed.

Executive Order of November 16, 1855:

Let the reservation be made, as proposed.

Act of April 13, 1864 (13 Stat. 39):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of April, anno Domini eighteen hundred and sixty-four, the state of California shall, for Indian purposes, constitute one superintendency, for which there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a superintendent of Indian affairs for said superintendency, at a salary of three thousand six hundred dollars per annum, who shall reside at a

point within said state, to be selected by the Secretary of the Interior, and who, upon executing a bond, upon such terms and such sum as may be prescribed by the Secretary of the Interior, and taking the usual oath of office, shall have under his control and management, in like manner and subject to like rules and regulations as are prescribed for superintendents of other superintendencies, the Indians and Indian reservations that are or may hereafter be established in said state: Provided, That the superintendent shall be authorized to appoint a clerk, at a compensation not to exceed eighteen hundred dollars per annum.

Sec. 2. And be it further enacted, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: Provided, That at least one of

said tracts shall be located in what has heretofore been known as the northern district: And provided, further, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to Congress, the same shall be approved and the money appropriated by law for that purpose: And provided, further, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaption to the purposes for which it is intended.

* * *

Sec. 4. And be it further enacted, That the President of the United States be, and he is hereby, authorized, by and with the advice and consent of the Senate, to appoint an Indian agent for each of the reservations which shall be established under the provisions of this act, which said agent shall reside upon the reservation for which he shall be appointed, and shall discharge all the duties now or hereafter to be required of Indian agents by law, or by rules and regulations adopted, or to be adopted, for the regulation of the Indian service, so far as the same may be applicable. Each of the agents appointed as aforesaid shall, before entering upon the duties of his office, give bond in such penalties and with such conditions and such security as the President or Secretary of the Interior may require, and shall hold his office for the term of four years, unless sooner removed by the President, and shall receive an annual salary at the rate of eighteen hundred dollars.

* * *

Executive Order of June 23, 1876:

> It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H.V.R., No.3'; thence south 17-1/2 degrees west, 905.15 chains, to southeast corner of reservation; thence south 72-1/2 degrees west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)

Petitioner omitted these same federal statutes and Executive Orders from the Petition in People v. McCovey, 36 Cal.3d 517, cert. den. 469 U.S. 1062

(1984), S.Ct. No. 84-453, which involved exactly the same issue as does this case.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The California Supreme Court's opinion accurately describes the case and the proceedings below at Petition, p. A-2-4, and Respondent adopts that statement as his own. However, because Petitioner's Statement of the Case is so misleading and inaccurate in its portrayal of the actual issue presented, and so distorts both the proceedings below and the record properly before the Court, a response to the most egregiously erroneous or deceptive portions of that Statement is necessary.1/

1/ The Petition in People v. McCovey, 36 Cal.3d 517, cert. den. 469 U.S. 1062 (1984) also was rife with misleading, partly-true and untrue statements.

The first portion of Petitioner's Statement of the Case which requires a response is the assertion in the first paragraph (Petition, p. 2) that,

> This case presents a long-standing controversy concerning the State of California's jurisdiction to regulate Indian commercial fishing in the lower Klamath River, a navigable waterway that the State of California holds in trust for all of its citizens.

Each element of the quoted sentence is fundamentally erroneous.

The first fundamental error is that the "controversy" described by Petitioner no longer exists except in the mind of counsel for Petitioner, having been long since resolved by prior decisions of the courts of California and this Court. Beginning with Elser v. Gill Net No. 1, 246 Cal.App.2d 30 (1966), continuing with Arnett v. 5 Gill Nets, 48 Cal.App.3d 454,

cert. den. 425 U.S. 907 (1974),[2/] and culminating with People v. McCovey, 36 Cal.3d 517, cert. den. 469 U.S. 1062 (1984), the courts of California have determined that the Hoopa Valley Indian Reservation ("Reservation") includes the Klamath River, that the Indians of the Reservation have federally-protected rights to fish in the Klamath River and other Reservation waters, and that California has no jurisdiction to dictate to the Indians of the Reservation how, where

---

2/ Pursuant to this Court's directive in Mattz v. Arnett, 412 U.S. 481 (1973) the California Court of Appeal specifically determined that the creation of the Reservation by Executive Orders issued pursuant to statutes authorizing the creation of Reservations for "Indian purposes" reserved fishing rights to the Indians of the Reservation, that California's jurisdiction to regulate the exercise of these rights was precluded by the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, and Public Law 83-280 (18 U.S.C. §1182, 28 U.S.C. §1360).

or when they may fish, how many fish they may catch, or where or for what purpose(s) they may possess or dispose of fish caught in Reservation waters.

This Court denied petitions for writ(s) of certiorari in both Arnett v. 5 Gill Nets and People v. McCovey. The decisions in those cases are fully consistent with recent federal court decisions which have considered the same issues, see, e.g., Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981), Pacific Coast Federation of Fishermen's Ass'n. v. Sect'y. of Commerce, 494 F.Supp. 626 (N.D. Calif. 1980), United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986), and with the official positions of the Secretary of the Interior and the Solicitor General. See, e.g., 42 Fed.Reg. 40904-5 (Aug. 12, 1977); 43 Fed.Reg. 30047-53 (July 13, 1978); 44 Fed.Reg.

17144-17151 (March 20, 1979); 46 Fed.Reg. 56057-8 (Nov. 13, 1981); 52 Fed.Reg. 27329-35 (July 16, 1987); Brief of the United States in this Court in Arnett v. 5 Gill Nets, supra, a true copy of which is included as Appendix B hereto, p. A-9. The second fundamental error is that Petitioner would divide the rights at issue in this case into "commercial" and "non-commercial" components. Neither the courts of California nor this Court ever have conditioned the existence of an Indian right to fish upon the use to which the Indians intend to put the fish they catch. See, e.g., Arnett, supra; McCovey, supra; Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44 (1973).

Compounding this second error, Petitioner's attack on the California Supreme Court's judgment is not limited

to "commercial" fishing rights. Rather, Petitioner's repeated use of the term "commercial" fishing rights is nothing more than a smokescreen to conceal Petitioner's actual objective:

> The People maintain (1) that, notwithstanding [People v.] McCovey [36 Cal.3d 517, cert. den. 469 U.S. 1062 (1984)] and numerous other state and federal decisions, the Indians of the Hoopa Valley Reservation in fact do not possess any federally reserved fishing rights in the Klamath River at all and (2) that the federal government lacked the constitutional authority to establish the regulations over Hoopa Valley Reservation fishing which this Court found preemptive in McCovey. [Emph. in original.]

Mattz v. Superior Court, Petition, p. A-17. In other words, the sole object of this Petition is to deprive the Indians of the Reservation of the right to fish in the Klamath River for any purpose -- a right which is "not much

less necessary to the existence of the Indians than the atmosphere they breathed." Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981).

The final fundamental error of the first sentence of Petitioner's Statement of the Case is that despite numerous opportunities to have done so, Petitioner never has properly put into issue the factual question whether any or all of the Klamath River between the Pacific Ocean and the Trinity River was navigable in 1850. Thus, the documentary "evidence" of which Petitioner sought judicial notice could not have been considered in any event.[3/] Mesaris v. Superior Court, 4 Cal.App.3d 976 (1970);

3/ Petitioner's attempt to have the Court take judicial notice of the navigability of any portion of the Klamath River is precluded by this Court's decision in Donnelly v. United States, 228 U.S. 213, reh. den., 228 U.S. 708 (1913).

Buck v. Superior Court, 245 Cal.App.2d 431 (1966); People v. McKee, 267 Cal.App.2d 509 (1969); People v. Taylor, 250 Cal.App.2d 367 (1967); People v. Crudginton (1979) 88 Cal.App.3d 295.

Indeed, to grant the Petition herein, this Court would have to reject the factual determinations of both the California Court of Appeal and the California Supreme Court that,

> The evidence presented at the preliminary hearing established that defendants are Yurok Indians of the Hoopa Valley Indian Reservation and that the charged offenses involved fish caught within the boundaries of the reservation. [Emph. added.]
>
> Petition, p. A-2. See also, Petition, P. A-32.

To do so would be inconsistent with the existing record and factual findings of the lower courts, a result which is inconsistent with both this Court's prac-

tice, McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430 (1939), and California law. Buck v. Superior Court, supra, Mesaris v. Superior Court, supra, People v. McKee, supra, People v. Taylor, supra.

Petitioner's Statement of the Case contains numerous other serious errors and outright misstatements. For example, Petitioner repeatedly asserts (Petition, pp. 5, 8 and 22) that the California Supreme Court "held" or "acknowledged" that "historical circumstances" indicate that California acquired title to the bed of the Klamath River upon its entry into the Union. This is blatantly untrue.

An examination of both the California Supreme Court's actual language (Petition, p. A-20) and the context in which it was used discloses that the California Supreme Court did not "hold" or "ack-

nowledge" that California actually acquired title to the riverbed in 1850. Rather, the California Supreme Court merely observed that the various documents of which Petitioner belatedly had requested judicial notice, and to which Respondents vehemently objected,

> go no further than to indicate that the state, upon entry into the union, acquired title to the river bed of the Klamath River and its resources; they do not state, nor imply, that the federal government, in extending the Hoopa Valley Reservation to include the old Klamath River Reservation, did not intend to protect the Indians' traditional fishing rights in the river.4/

A glaring example of an outright falsehood is Petitioner's claim (made

---

4/ The Court of Appeal did not reach -- or even specifically mention -- Petitioner's contentions about its ownership of the riverbed. The Court of Appeal agreed that the fish were caught in the Klamath River on the Reservation, and that Respondent has a federally-reserved right to fish in the Klamath River.

twice) that the California Supreme Court, "does not even mention[]" a 1940 opinion of the Interior Department's Solicitor. In fact, the California Supreme Court specifically referred to that Opinion. Petition, p. A-17.

A seriously misleading omission from the Petition is the failure to mention that Petitioner induced Respondent to waive his right to a speedy trial by making express and unconditional representations to Respondent and the Court of Appeal that the California Supreme Court's decision in McCovey would be dispositive of the jurisdictional issue in this case. There was never any suggestion by Petitioner that it would accept the decision in McCovey as dispositive only if each of its arguments was specifically addressed and rejected.

Yet another example of Petitioner's misleading and/or inaccurate statement of the case is the wholly unsubstantiated and inaccurate characterization of California's permanent and absolute ban on the sale of fish caught in the Klamath River as a necessary and Nondiscriminatory conservation measure. Not only is the record completely devoid of any evidence to support Petitioner's claim, but also the claim could not have been substantiated had an evidentiary hearing been held on that issue.[5/] The plain

---

[5/] Both in People v. McCovey, supra, and in this case, the California Supreme Court found that California's legitimate conservation interests are fully protected by the federal regulations governing fishing by Indians of the Reservation. If the question whether California's absolute and permanent ban on the use of gill nets in the lower 20 miles of the Klamath River by Reservation Indians and the sale of any fish caught in the Klamath River system constitutes a reasonably necessary and non-discriminatory

(continued...)

5/ (...continued)
conservation measure had been raised before the committing magistrate, Respondent would have produced persuasive evidence to prove the following facts: historically, the salmon runs in the Klamath River were predominantly wild-stock fish, and at least until relatively recently, hatchery-bred fish comprised only a small portion of each year's fall spawning run; shifts in the composition of salmon runs have not been caused by Indian fishing; transformation to a predominantly hatchery-based fishery has adverse genetic effects and risks; the salmon resources of the Klamath declined because of destruction of spawning habitat and state-sanctioned overharvest in the ocean while under exclusive State jurisdiction between 1933 and 1975; between 1975 and at least 1985, California consistently refused to support or impose any regulatory regime which would recognize and accommodate the Hoopa Valley Indian salmon fishery, in order to minimize the economic impacts upon the ocean troll fishery of restoring the salmon resources of the Klamath River system; due to "shaker" mortality, the non-Indian ocean troll fishery wastes far more Klamath River salmon than the Indian net fishery harvests, and, according to official reports by the U.S. Fish and Wildlife Service and the Pacific Fisheries Management Council, the combined harvest of the non-Indian ocean commercial, ocean sport and in-river sport

(continued...)

facts are that California's statutory regulatory scheme does not make and never has made any provision whatsoever for the

---

5/(...continued)
fisheries consistently has exceeded the total Indian net harvest, sometimes by as much as 1500%; the relative impacts of the various user groups on Klamath River chinook salmon stocks without accounting for either shaker mortality (estimated by the U.S. Fish and Wildlife Service and the Pacific Fisheries Management Council to average 30%) or incidental loss of fish in the Indian net fishery (estimated to average 8% or less) show that a properly regulated in-river Indian net fishery is not inherently destructive of the Klamath River's salmon resources; California's ban on the sale of even a single fish caught in the Klamath River serves no valid, non-discriminatory conservation purpose; federal and Tribal resource restoration and law enforcement efforts and expenditures have been substantial, and are increasing; California's conservation interests are more than adequately protected by the existing comprehensive federal scheme of regulation and enforcement, together with the judicial remedies available through the Reservation Court of Indian Offenses (25 C.F.R. Part 250) and the Lacey Act, 16 U.S.C. §3372(a)k; and since 1985 the runs of Klamath River Chinook salmon have exceeded even California's long-term spawning escapement goals. 52 Fed.Reg. 27329-35.

existence of the right of Indians to use gill nets on the lower Klamath River or to sell fish caught anywhere on the Reservation, and that California's regulations constitute a discriminatory allocation scheme under which virtually the entire burden of conserving the salmon resources of the Klamath River falls upon the in-river Indian net fishery.

Based upon the actual record and proceedings below, the only issues which legitimately could have been presented by a timely petition herein are whether the California Supreme Court correctly determined that events occurring in 1985 did not retroactively vest California with jurisdiction to prosecute Respondent for acts allegedly committed in 1981; that California has no basis upon which to limit the exercise of Respondent's federally-reserved fishing rights to fish

which spawn within the boundaries of the Reservation; and that prior decisions of the State and federal courts preclude Petitioner from relitigating an issue which already has been finally adjudicated.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE IT IS UNTIMELY.

Under Supreme Court Rule 20.1, a petition for a writ of certiorari to review the judgment in a criminal case of a state court of last resort must be filed within 60 days after the entry of such judgment. 28 U.S.C. §2101(c) requires that a petition for writ of certiorari in a civil case be filed within 90 days after the date of entry of judgment.

Judgment was deemed entered in this case on October 13, 1988, the date upon

which the California Supreme Court denied the People's petition for rehearing. The Petition herein was filed on or about January 6, 1989.

This case began as a criminal prosecution. At the conclusion of the preliminary hearing, the defendants moved to dismiss the prosecution for lack of jurisdiction. The magistrate found that the fish at issue had been "taken from the Klamath River within the Reservation . . . " and proceeded to grant the motion to dismiss on the ground that California lacked jurisdiction to prosecute Hoopa Valley Reservation Indians for the taking or disposition of fish caught in Reservation waters. Appendix A, p. 1; see also, Petition, p. A-2-4.

The People moved in the Superior Court to reinstate the prosecution pur-

suant to California Penal Code ("P.C.") §871.5. Petition, p. A-2. The Superior Court granted the People's motion, relying upon the decision of the California Court of Appeal in People v. McCovey, 145 Cal.App.3d 190 (1984)[6/], which had held that because the Secretary of the Interior's Hoopa Valley Indian fishing regulations prohibited "commercial" fishing, those regulations did not preempt California's jurisdiction to prosecute Reservation Indians for the off-Reservation sale of salmon caught in the Klamath River or other Reservation waters. Accordingly, the prosecution was ordered reinstated. Petition, p. A-2.

Under California law, a Superior Court order under P.C. §871.5 reinstating

---

6/ This decision was reversed by the California Supreme Court in People v. McCovey, 46 Cal. 3d 517, cert. den. 469 U.S. 1062 (1984).

a prosecution is not appealable. Rather, a defendant's only remedy, other than to proceed to trial and then appeal if convicted, is to petition the Court of Appeal for a writ of prohibition pursuant to P.C. §999a. In re Torres, 128 Cal.App.3d 826 (1982).

A petition for a writ of prohibition under P.C. §999a is an original proceeding, but only in the sense that it is first filed in an appellate court. It serves exactly the same function as does a post-conviction appeal on a question of law, but without requiring a full trial before a court which may lack jurisdiction. For this reason, a petition under P.C. §999a must be determined solely upon the record which was before the committing magistrate. Mesaris v. Superior Court, 4 Cal.App.3d 976 (1970); Buck v. Superior Court, 245 Cal.App.2d 431

(1966); People v. McKee, 267 Cal.App.2d 509 (1969); People v. Taylor, 250 Cal.App.2d 367 (1967).

But for the eventually successful petition under P.C. §999a, Respondent Mattz and his co-defendant would have been prosecuted for conspiracy and other felonious acts. If the California Supreme Court had not granted the relief sought that prosecution would have proceeded. Because the issue raised in Respondent's P.C. §999a petition went to the heart of the charges against him, it was an integral part of the underlying criminal prosecution. Thus, the 60-day time limit of Supreme Court Rule 20.1 should apply to the Petition herein. See, e.g., Heflin v. United States, 358 U.S. 415, 416 (n.7) (1959).

The 60-day limit for seeking a writ of certiorari in a criminal case is set

by Court rule, rather than statute. Thus, the untimely filing of the Petition in this case is not a jurisdictional defect. However, if the Court's rules are to have any meaning, they should be enforced unless a party can demonstrate a good reason why non-compliance should be excused.

Petitioner has made absolutely no attempt to excuse the untimely filing of the Petition herein, nor can Petitioner make such a showing. The fundamental issues in this case -- i.e., the nature and extent of the fishing rights of the Indians of the Hoopa Valley Reservation, and California's jurisdiction over the exercise of those rights -- are not issues of first impression.7/ Some of the

---

7/ See, e.g., Elser v. Gill Net No. 1, 246 Cal.App.2d 30 (1966); Donahue v. Justice Court, 15 Cal.App.3d 557 (1971); (continued...)

same attorneys representing Petitioner in this action also represented Petitioner in a number of those earlier cases.[8] Petitioner's counsel are experienced in seeking review and/or actually litigating before this court.[9]

Thus, there can be no credible excuse or justification for Petitioner's

---

7/ (...continued)
Mattz v. Arnett, 412 U.S. 481 (1973); Arnett v. 5 Gill Nets, supra; Pacific Coast Federation of Fishermen's Ass'n. v. Sect'y. of Commerce, 494 F.Supp. 626 (N.D. Ca. 1980); Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981); United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986); People v. McCovey, supra. Indeed, the question whether the Klamath River is within the boundaries of the Hoopa Valley Reservation was considered and resolved by this court in 1913. Donnelly v. United States, supra.

8/ See, e.g., Donahue, Mattz v. Arnett, Arnett v. 5 Gill Nets, Blake, Eberhardt (as amicus curiae), McCovey.

9/ See, e.g., Mattz v. Arnett, supra; Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. den. 429 U.S. 1038; Arnett v. 5 Gill Nets, supra, People v. McCovey, supra.

failure to timely file its Petition. If for no other reason than this, the Petition should be denied.

II. GRANTING THE PETITION IS NEITHER NECESSARY NOR APPROPRIATE.

A. The California Supreme Court Correctly Held that Petitioner Is Barred by the Doctrine of Res Judicata/Collateral Estoppel from Relitigating the Existence of the Federally-Reserved Fishing Rights of the Indians of the Reservation.

The Petition consists exclusively of an attack upon the California Supreme Court's rejection of the merits of what Petitioner characterizes as its "main argument" -- i.e., that the Indians of the Hoopa Valley Reservation have no fishing rights whatsoever because title to the bed of the Klamath River passed to California in 1850.

What the Petition fails to mention, and what Petitioner would like this Court to ignore, is that the California Supreme Court actually based its rejection of this argument on two independent

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

//

grounds.[10] The first of these grounds

---

[10] The Petition also is silent about the two grounds upon which the California Supreme Court reversed the decision of the Court of Appeal prior to addressing Petitioner's "main argument"; i.e., rejection of the Court of Appeal's "novel theory" that alleged changes in resource abundance in 1985 could confer upon California jurisdiction to prosecute acts allegedly committed in 1981; and correction of the Court of Appeal's mistaken assumption that the California Supreme Court's decision in People v. McCovey could be read as limited to fish which actually spawn on the Reservation.

The selective omission of the portions of the California Supreme Court's decision which are fatal to Petitioner's case is typical of Petitioner's duplicity throughout this case. Petitioner induced Respondents to waive their right to a speedy trial by falsely representing that the California Supreme Court's final decision in People v. McCovey would be dispositive in this case. When Petitioner lost in People v. McCovey and this Court denied the petition for a writ of certiorari, Petitioner represented to the California Court of Appeal that the district court's decision in United States v. Wilson, 611 F.Supp. 813 (N.D. Calif. 1985) had created a regulatory void which threatened the extinction of the resource. In fact, United States v. Wilson, id., had invalidated only the ban on fish sales, and left the rest of the

(continued...)

was based upon the observation that,

> To begin with, the People's broad claim that Yurok Indians enjoy no federally protected fishing rights in the Klamath River flies directly in the face of all of the recent federal and state decisions involving Yurok Indian fishing on the Hoopa Valley Reservation.

Petition, p. A-18. The accuracy of this observation cannot be disputed. See, e.g., Arnett v. 5 Gill Nets, supra; Blake v. Arnett, supra; Pacific Coast Federation of Fishermen's Ass'n. v. Sect'y. of Commerce, supra; United States v. Eber-

---

10/(...continued)
Secretary's regulatory scheme intact. The entire scheme was reinstated by the Ninth Circuit's decision in United States v. Eberhardt, supra, a fact of which the Petitioner never apprised the Court of Appeal.

A review of the petitions for writs of certiorari in Arnett v. 5 Gill Nets and People v. McCovey will show that Petitioner displayed similar disregard for the facts, the record and the truth in its efforts to persuade this Court to grant review in those cases.

hardt, supra; People v. McCovey, supra. Neither can it be disputed that numerous prior decisions -- State and federal -- have established that the Klamath River is within the boundaries of the Hoopa Valley Reservation. See, e.g., Elser v. Gill Net No. 1, supra; Donahue v. Justice Court, supra; United States v. Eberhardt, supra; Donnelly v. United States, supra.11/

11/ [I]n view of all the circumstances, it would be absurd to treat the [1891 executive] order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river . . . the reports of the local Indian agents and superintendents to the commissioners of Indian Affairs abound in references to fishing as their principal subsistence, and the river is described as running in a narrow canyon through a broken country, the Indians as dwelling in small villages close to its banks. [Citations.]

(continued...)

To Petitioner's claim that these prior decisions did not expressly consider the historical evidence or legal theory now being advanced,[12] the California Supreme Court held as a matter of California law that,

> The reach of those decisions, however, may not be so readily circumvented. The issue of the existence of federally reserved Indian fishing rights was directly in question in each of these cases, and the State of California was in fact a principal litigant in several of the proceedings. The People had ample opportunity in the prior litigation to challenge the validity of Indian fishing rights in the Klamath River on the theory they now urge. Having failed to successfully pursue such a legal argument in those cases, they may not avoid the holdings of those decisions

---

11/ (...continued)

Donnelly v. United States, 228 U.S. at 259.

12/ Petitioner offered substantially the same evidence and made the same arguments in People v. McCovey, supra.

> at this juncture by resort to ostensibly newly discovered historic evidence or a new legal theory. (See, e.g., Price v. Sixth District Agricultural Assn. (1927) 201 Cal. 502, 511 ["an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result."]) This is particularly true in a situation, like the present one, where many individuals have relied on the past decisions over a number of years and where a comprehensive federal regulatory scheme--adopted in the wake of the earlier decisions--has been in place for more than a decade. (Cf. Arizona v. California (1963) 373 U.S. 546, 598.)

Petition, p. A-19.[13/] See, also, Allen v. McCurry, 449 U.S. 90 (1980); Bernhard v. Bank of America, 19 Cal.2d 807 (1942);

13/ This holding was especially appropriate in light of this Court's express instruction in Mattz v. Arnett, supra, that the fishing rights issue be addressed on remand.

Pacific Mutual Life Ins. Co. of Calif. v. McConnell, 44 Cal.App.2d 715 (1955); Vanguard Recording Society v. Fantasy Records, Inc. 24 Cal.App.3d 410 (1972).

The California Supreme Court's adherence to its prior decision in People v. McCovey thus was correct as a matter of California law, and for that reason review by this Court is neither necessary nor appropriate.

B. The California Supreme Court Correctly Rejected on the Merits Petitioner's Argument that the "Equal Footing Doctrine" Precludes the Existence of the Fishing Rights of the Indians of the Hoopa Valley Reservation.

Petitioner contends that the alleged navigability of the Klamath River in 1850 conferred upon it ownership of the fish which swim in the river, prevented the inclusion of the River in the Hoopa Valley Reservation, and thus prevented the

United States from reserving to the Indians of the Reservation the fishing rights which, "are not much less necessary to the Indians [of the Reservation] than the atmosphere they breathed." Blake v. Arnett, supra. Amici join in this argument, notwithstanding that the California Supreme Court's decision has no application outside California.

The principal fatal flaw in Petitioner's argument is its erroneous assumption that purported State ownership of the riverbed necessarily is inconsistent with the right of Reservation Indians to fish therein free of State regulation. This contention is contrary to the massive body of case law which has recognized that the "equal footing" doctrine does not limit the federal government's authority to protect Indians or federal interests in property and natural

resources, nor does the doctrine give the State ownership of free-swimming fish in navigable waters.

Under Article I, §8, Cl. 3 of the Constitution, Congress has plenary power not only over international and inter-state commerce, including wildlife, see, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1980), but also over all aspects of Indian affairs. United States v. Kagama, 117 U.S. 375 (1986); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865). Under Article IV, §3, Cl. 2, the United States has similar authority over its property and wildlife. Kleppe v. New Mexico, 426 U.S. 529 (1976), even to the extent of reaching beyond the limits of federal lands, Camfield v. United States, 167 U.S. 518 (1867), and preempting state regulation of hunting and fishing in the navigable waters of a state. Minnesota

v. Block, 660 F.2d 1240 (8th cir., 1981), cert. den., 455 U.S. 1007; United States v. Brown, 552 F.2d 817 (8th Cir. 1977), cert. den., 431 U.S. 949.

The only significant constraint on the exercise of federal authority over Indian Affairs is that such exercise must ". . . be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . ." Morton v. Mancari, 417 U.S. 535, 555 (1974). The power of the United States under the Property Clause is similarly expansive; i.e., federal regulations must be "needful" prescriptions "respecting" federal property. United States v. San Francisco, 310 U.S. 16 (1940); United States v. Brown, supra; United States v. Lindsey, 595 F.2d 5 (9th Cir. 1979).

Thus, the determinative question for jurisdictional purposes has never been

whether the federal reservation or regulation of a resource right occurred before or after statehood, but whether the federal action was or is necessary or justifiable in the fulfillment of a proper federal objective. If so, the state's police prerogatives -- even as to hunting or fishing in navigable waters or for migratory wildlife -- will be subordinated to the exercise of federal authority under the Constitution's Supremacy Clause, Article VI, Cl. 2. See, e.g., U.S. v. North Dakota, 650 F.2d 911 (8th Cir. 1981); affirmed, 458 U.S. 1129 (1983); Menominee Tribe v. United States, 391 U.S. 404 (1968).

As was held in Arizona v. California, 373 U.S. 546, 598 (1963), decree entered, 376 U.S. 340 (1964), modified, 439 U.S. 419 (1979), further modified, 460 U.S. 605 (1983),

> We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

Washington v. Fishing Vessels Ass'n., 443 U.S. 658 (1979), correctly construed the federal power described in Arizona v. California, id., as applying to Indian fishing rights, and the California Supreme Court did the same. See also, Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Minnesota v. Block, supra (Wilderness); United States v. Brown, supra (National Park); United States v. Lindsey, supra, 595 F.2d 5 (National Forest, National Recreation Area, Wild and Scenic River); United States v. Hells Canyon Guide Service, Inc., 660 F.2d 735 (9th Cir. 1981); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (hydroelectricity).

Petitioner's argument that California owns the fish swimming in the Klamath River, and thus that the United States lacked the authority to preserve the ability of the Indians of the Reservation to sustain themselves by fishing in the Klamath River and other Reservation waters, is a legal anachronism which has no support in modern case law; indeed, it has been consistently repudiated in a succession of Supreme Court decisions over the past forty years. See, e.g., Toomer v. Witsell, 334 U.S. 385, 402 (1948); Douglas v. Seacost Products, Inc., 431 U.S. 265, 284 (1977); Hughes v. Oklahoma, 441 U.S. 322 (1980). Thus, in rejecting this argument, the California Supreme Court did no more than this Court repeatedly has done, and there is no reason for this Court to consider the issue yet again.

C. The Circumstances Surrounding the Creation of the Reservation Indicate that the Reservation Includes the Klamath River.

Even if the prior decisions of the courts of California and the United States had not already definitively determined that the Hoopa Valley Reservation includes the Klamath River within its boundaries, there can be no doubt that the primary purpose for which the United States established and enlarged what is now known as the Hoopa Valley Reservation was to protect the Indians from "their deadliest enemies" -- the non-Indian people of the State of California, see, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886), by setting aside a Reservation which would assure the continued availability of the fish and other resources of the Klamath River that were "not much less necessary

to the existence of the Indians than the atmosphere that they breathed." Blake v. Arnett, supra, 663 F.2d at 906.

If the 1855 and 1891 Executive Orders which established the original Reservation and then extended the Hoopa Square to encompass the original Reservation had intended to exclude the Klamath River, those orders would have referred to two strips of country, each one mile in width, on either side of the River, or established the banks of the river as the boundaries of the Reservation. See, e.g., Montana v. United States, 50 U.S. 544 (1981). Instead, the Executive Orders set aside a single strip of country, with its outer boundaries measured from the Klamath River.

As the Supreme Court observed in Donnelly v. United States, id., 228 U.S. at 259,

> Indeed, in view of all of the circumstances, it would be absurd to treat the [Executive] order [establishing the Reservation] as intended to include the uplands to the width of 1 mile on each side of the river, and at the same time to exclude the river. As a matter of history, it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.[14/]

See also, Mattz v. Arnett, supra; Arnett v. 5 Gill Nets, supra; Pacific Coast Federation of Fishermen's Ass'n. v. Secretary of Commerce, 494 F.Supp. 626, 632-33 (1980).

Without the Klamath River and the reserved right to fish therein, the Klamath River Reservation would have been

---

14/ Although the Court withdrew the portion of its opinion that had determined that the river was non-navigable, the Court left intact its holding that the river was within the Reservation, 228 U.S. at 1035. Otherwise, there would have been no federal jurisdiction to prosecute for an offense which may have occurred in the Klamath River.

as useless to the Indians for whom it was established as the post-statehood Reservation lands at issue in Arizona v. California, supra, would have been to the Indians thereof without federally-reserved water rights. The California Supreme Court correctly determined that the federal government did not intend such a result, and there is no reason in law or justice why Petitioner should be allowed to rewrite history to reach a contrary conclusion.

CONCLUSION

The untimely and misleading Petition herein seeks to overturn a decision of the California Supreme Court which is consistent with numerous California and federal court decisions of the past several decades, as well as the broader principle of California law that a litigant is not allowed to relitigate an

issue ad infinitum simply by offering new legal theories or evidence which could have been presented in prior proceedings. The Petition seeks to inflict this catastrophe upon the Indians of the Hoopa Valley Reservation without an evidentiary record, and without any showing either that there is a valid conservation necessity for the assertion of State jurisdiction, or that California's absolute and permanent ban on Indian sales of fish caught in Reservation waters does not discriminate against the Indians of the Reservation by reserving the entire harvestable portion of the resource to the non-Indian commercial troll and sport fisheries.

Petitioner also asks this Court to countenance a decision by the California Court of Appeal which, while upholding the federally-reserved right of the In-

dians of the Reservation to fish in the Klamath River, nonetheless held that changes in resource abundance in 1985 gave California jurisdiction to prosecute Respondent for acts committed in 1981, and that California could abolish Indian fishing rights simply by establishing off-Reservation hatcheries.

For all of the reasons set forth above, the Petition should be denied.

Dated: February 14, 1989.

Respectfully submitted,

GEORGE FORMAN
ALEXANDER & KARSHMER

By: _____
GEORGE FORMAN
Attorney for Respondent
Kenneth Mattz

IN THE JUSTICE COURT OF CALIFORNIA
COUNTY OF DEL NORTE
DEL NORTE JUSTICE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

-vs-

DIANE MATTZ, TINA WHIPPLE, TONY FOLKINS, RAYMOND MATTZ, ANDREW WHIPPLE, KENNETH MATTZ, MARVIN MATTZ, DARRELL MOOREHEAD, and FRANKLIN MOOREHEAD,

Defendants.

No. 46-19

RULING ON MOTION TO DISMISS

This matter came on regularly for preliminary hearing in the Justice Court of California, County of Del Norte, Del Norte Judicial District, on Monday, May 24, 1982. Judge P. Timothy Murphy was assigned by the Judicial Council to hear the matter.

The evidence introduced in the preliminary hearing consisted of the testimony of John D. Gavitt, special

agent for the U.S. Fish and Wildlife Service. The evidence indicates that all Defendants were, in some manner, involved in the commercial sale of salmon off the Reservation taken from the Klamath River within the Reservation at or about the times alleged in the complaint. At the conclusion of his testimony, it was stipulated by District Attorney Weir and all defense counsel that all the above-named defendants were and are eligible Fishers and eligible Indians, pursuant to Title 25, Code of Federal Regulations, Section 258.5, i.e., Indian persons entitled to fish on the Klamath or Trinity River within the confines of the Hoopa Indian Reservation and the "Extension," defined as one mile on either side of the Klamath River from the westerly border of the Hoopa Reservation to the sea. At the close of the evidence

introduced by the prosecution, all defense counsel joined in a motion to dismiss the action for lack of jurisdiction, in addition to individual motions reflected in the transcript.

The issue presented by the motion to dismiss is whether the State of California can constitutionally pass legislation and enforce laws which control the manner in which Eligible Indian fishermen can dispose of salmon off the Reservation that have been taken from waters within the Reservation.

The parties have submitted extensive briefs, and after a review of the cases cited by all parties and the pertinent federal regulations, this magistrate concludes that the motion to dismiss must be and shall be granted for lack of jurisdiction.

Federal regulations regulating Klamath River fishing by Indians were first issued on August 12, 1977, and in those initial regulations the Department of the Interior, Bureau of Indian Affairs specifically reserved the question of whether, absent the regulations, the Indians possessed rights to fish commercially in the Klamath River. Interim rules were adopted on July 13, 1978, which, in part, provide in the preamble:

> ...Based upon the history of Indian fishing on the Klamath as well as on the substantial case law interpreting federal fishing rights, the Department has concluded that the Indians' reserved fishing right includes the right to use fish for commercial purposes...
>
> 43 FR 135, pg 30043 (7/13/78)

The federal rules passed in July of 1978 (43 FR 135, pg 30052) specifically provide in Section 258.10 for the method

of handling the sale of salmon and steelhead, and also specifically provide for the regulation of fish buyers both on and off the Reservation under Section 258.13. In Section 258.5, as amended, the regulations limited the catching of fish for sale to no more than five anadromous fish per day per person. The regulations were expanded, by the final rules enacted by the Bureau of Indian Affairs, Department of the Interior, on March 20, 1979. These regulations are extremely detailed and, among other things, specifically define commercial fishing under Section 248.4(b) and subsistence of consumptive fishing under subdivision (r). Under Section 258.8(c) commercial fishing was prohibited for that year and the regulations provided for a comprehensive plan and method of enforcement for violation of any of the

regulations under Sections 258.14 and 258.15. Section 258.17 specifically provides:

> The Hoopa Valley Indian Reservation Court of Indian Offenses established under 25 CFR Part II has jurisdiction which is limited to trying eligible Indians accused of violating the regulations of this Part and to determine whether nets and other fishing gear were forfeited.

Further regulations were passed in 1980 and 1981 modifying and changing various rules but consistently providing for a penalty on Indian fishers for violation of the rules, including violating the seasonal prohibitions against commercial fishing. Arnett v. 5 Gill Nets (1975) 48 Cal.Ap.3d 454, noted that Indians made their living by commercial fishing in the early years of the century, and further noted that Public Law 280, 28 USC 1360, provides

that its application shall not deprive any Indian or tribal band of any right, privilege or immunity under federal treaty, agreement or statute with respect to hunting, trapping, fishing, or the control, licensing or regulation thereof. [Emphasis added.]

The State of California, through Section 8685.6 and 8434, Fish and Game Code, is clearly attempting to control commercial salmon fishing by the Indians of the Hoopa Reservation.

At this time it appears that the three tests to reach this decision, as indicated by the court in People v. Frank, 101 CA3d Supp8 (1979), have been met -- especially as it refers to the regulation of the salmon fishery:

(1) The federal regulations are now extremely detailed and comprehensive as to the regulation of the salmon fishing

on the Klamath River and it is reasonable to infer that Congress left no room for states to supplement them.

(2) The federal regulations specifically indicate that the commercial salmon fishery by Indians is in fact now regulated in an area exclusively under Federal jurisdiction.

(3) Enforcement of state law does in fact present a serious conflict with the administration of the federal program.

Having ruled that this court has no jurisdiction, it is unnecessary to rule on the other pending motions; and the complaint against the above-named defendants is hereby dismissed.

DATED: June 8, 1982

/s/ R. Timothy Murphy
Assigned Judge

In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-527

G. RAYMOND ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME, STATE OF CALIFORNIA, PETITIONER

v.

5 GILL NETS, ETC., AND RAYMOND MATTZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT, DIVISION THREE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of December 15, 1975, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

The decision below was rendered on remand from this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481.

In 1969 a California game warden seized five gill nets owned by Raymond Mattz, a Yurok (Klamath River) Indian, and instituted a forfeiture proceeding in state court on the ground that the nets were contraband under

the Califoria Fish and Game Code. When seized, the nets were being stored some 200 feet from the Klamath River within the Klamath River Indian Reservation.[1] Mattz intervened in the forfeiture proceeding asserting his ownership of the nets, his use of them at his family's traditional fishing location, and the inapplicability of the California Fish and Game Code to his fishing activities within the Reservation. The state trial court held that the Reservation had been abolished and ordered the forfeiture. The state court of appeal affirmed (see *Mattz, supra,* 412 U.S. at 483–485). This Court reversed, holding that the Reservation had not been abolished and that all land within it remained "Indian country" within the meaning of 18 U.S.C. 1151 (412 U.S. at 506). The Court remanded the case for determination of the "questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status" (*id.* at 485).

On remand, the state trial court, after an evidentiary hearing (see Pet. App. 12), held that the State may not regulate fishing by Indians on the Klamath River Reservation and ordered the nets returned (see Pet. App. 2). The state court of appeal, in a thorough opinion, affirmed (Pet. App. 1–12). The court held that the creation of a reservation "'for Indian purposes' encompasses the right to hunt and fish on the reservation without further specification" (Pet. App. 8), citing, *inter alia, Menominee Tribe v. United*

[1] The nets were located on land owned by a logging company (Pet. App. 2).

States, 391 U.S. 404, and that "[t]his is particularly clear on the reservation in question which was obviously chosen with reference to the fishing," citing *Mattz, supra,* 412 U.S. at 487 (Pet. App. 8).

The court also rejected the State's contention that the State had acquired jurisdiction to regulate Indian fishing within the Reservation as a consequence of Public Law 280, 67 Stat. 588, 18 U.S.C. 1162 (Pet. App. 4–9). That Act extends to the State of California jurisdiction over offenses committed by Indians within Indian country in the State, but also provides (18 U.S.C. 1162(b)) that nothing therein shall deprive any Indian or Indian tribe of any fishing right "afforded under Federal treaty, agreement, or statute." The court rejected the State's contention that the proviso did not apply to the Klamath River Reservation because the Reservation was established by executive order, noting that the Reservation was "not created by executive order but by statute"—the Act of March 3, 1853, 10 Stat. 226, 238, by which the President was authorized to set aside five reservations "for Indian purposes" (Pet. App. 5–6). The court also rejected the State's contention that the proviso was intended to exclude fishing rights granted by executive order, finding such an interpretation to be unwarranted by the legislative history of the Act (*id.* at 6–8).

Finally, the court rejected, as unsupported by the facts, the State's contention that it had authority to regulate fishing within the Reservation as a necessary conservation measure. The court found "[t]he record

on this argument * * * not persuasive" (Pet. App. 11, see discussion at 11–12).[2]

The Supreme Court of California denied the State's petition for review (Pet. App. 15).

ARGUMENT

In our view the decision below is correct, does not conflict with any decision of this Court or any other court, and presents no issue of general importance requiring review by this Court.

1. The history of the establishment of the Klamath River Indian Reservation by executive orders and congressional Acts as a home for the Yurok Indians and other tribes that lived and fished along the Klamath River, is set forth in detail in *Mattz, supra,* 412 U.S. at 485–494. The California court of appeal correctly held that the creation of the Reservation under these circumstances reserved to the Indians the right to fish on the Reservation without state interference.

There are two sources of this right. First, it stems from the general principle that bars the States from exercising jurisdiction over the activities of Indians within Indian reservations, except where affirmatively authorized by Congress. See *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 167–173; *Williams* v. *Lee,* 358 U.S. 217; see also *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 147–149; *Alva Fisher* v. *The District Court of the Sixteenth Judicial District of Montana,* No. 75–5366, decided *Per curiam,* March 1, 1976. Second, the special right to hunt and fish free from

[2] The court also rejected the State's contention that it could confiscate the nets because they were on non-Indian land (Pet. App. 9–10).

limitation by state authorities is implicit in the reservation of the land. *Menominee Tribe* v. *United States,* 391 U.S. 404, 406, 412, n. 12. This is particularly clear here, for as the Court noted in *Mattz, supra,* 412 U.S. at 487, the Klamath River site was chosen as a reservation because it was the Indians' historic home and the river "abounded in salmon and other fish."

That executive orders played a prominent role in the creation of the Reservation does not change this result. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. Accordingly, in *Arizona* v. *California,* 373 U.S. 546, the Court rejected Arizona's argument that water rights for Indian reservations could only be reserved by treaty and that four executive-order reservations along the lower Colorado River lacked reserved water rights. 373 U.S. at 598. See also *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (C.A. 9).

Nor has the Court drawn distinctions, for purposes of criminal jurisdiction, on the basis of the method of establishing a reservation. The Colville Reservation, which was the subject of the Court's decision in *Seymour* v. *Superintendent,* 368 U.S. 51, holding state criminal law inapplicable to crimes involving Indians anywhere within an Indian reservation, was a reservation established by executive order. See also *Antoine* v. *Washington,* 420 U.S. 194, 205–206.

With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

2. Petitioner's primary contention (Pet. 12–25) is that Public Law 280 granted the State control over Indian fishing on the Klamath River Reservation. Congress, in Public Law 280, granted California "jurisdiction over offenses committed by or against Indians in the areas of Indian country" within the State. 18 U.S.C. 1162. However, the statute continues with the proviso that (18 U.S.C. 1162(b)):

> Nothing in this section shall * * * deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Petitioner argues that the proviso is inapplicable to Indian fishing on the Klamath River Reservation because the Reservation, and thus any fishing right, was established by executive order rather than "treaty, agreement, or statute." The court of appeal properly rejected this contention (Pet. App. 4–9).

In *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 57, this Court interpreted the same proviso as protecting Indian fishing rights established by regulation, despite the absence of the word "regulation" in the proviso. The Court pointed out that the authority to make the regulation was statutory and that "[t]he apparent purpose of the proviso was to preserve *federally granted fishing rights*" (emphasis added), even though created by regulation.

Likewise, the fishing rights enjoyed by the Indians in connection with this Reservation are afforded by statute—the statutes authorizing establishment of the Reservation. As this Court recognized, in *Mattz* the Reservation was set aside by executive order in 1855 or 1891. In either case the executive order was based on previous Acts of Congress—the Acts of March 3, 1853, 10 Stat. 226, 238, and March 3, 1855, 10 Stat. 686, 699, or the Act of April 8, 1864, 13 Stat. 39; see *Mattz, supra,* 412 U.S. at 484, 487–494. See, also, *Donnelly* v. *United States,* 228 U.S. 243, 255–259.

Petitioner suggests (Pet. 17) that rights based on executive order were deliberately not protected in Public Law 280 because Congress set out to safeguard only those rights for which it might owe compensation under the Fifth Amendment, and that under *Sioux Tribe* v. *United States,* 316 U.S. 317, no compensation would be owed for abolishing a reservation created by executive order. There is, however, nothing in the legislative history of the Act stating such a purpose. Moreover, there is no reason why Indians on a reservation established by executive order should have less right of self-government or less protection for their resources from state interference than Indians on other reservations. There is thus no reason to assume that Congress intended to preserve fishing rights on all reservations but those established by executive order.

3. Petitioner's final contentions (Pet. 25–42) are that even if respondent has a fishing right as a result

of the creation of the Reservation, and even if that right has been preserved by Public Law 280, the right is subject to state regulation when exercised on non-Indian owned land, the right may be limited by the State to subsistence fishing, and the right may be regulated by the State in the interest of conservation. We deal with these in turn.

a. Respondent's fishing within the Reservation was at his family's traditional fishing spot on the river (Pet. App. 10), not on private land. The nets were stored on private land, but without objection by the landowner. No issue is presented here regarding the right of an Indian to fish from private land. Cf. *Antoine* v. *Washington,* 420 U.S. 194, 212 (Douglas concurring); see also *United States* v. *Winans,* 198 U.S. 371.

b. Petitioner cites no authority, and we know of none, that would limit an Indian's on-reservation hunting or fishing to subsistence. The purpose of a reservation is not to restrict Indians to a subsistence economy but to encourage them to use the assets at their disposal for their betterment. See *McClanahan, supra,* 411 U.S. at 169–171. Moreover, Indian fishing rights have on several occasions been interpreted by this Court as extending to commercial fishing. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392, 395–396; *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44, 48. The court of appeal thus properly rejected petitioner's contention that the State could prohibit net fishing by respondent as a means of limiting him to subsistence fishing (Pet. App. 8–9).

c. The court of appeal also properly rejected petitioner's contention that it could impose its prohibition of net fishing against respondent as a conservation measure (Pet. App. 11–12). We know of no authority that would permit state regulation of Indian fishing *within* an Indian reservation for conservation purposes. State regulation, where necessary for conservation, has been permitted in regard to the exercise of *off-reservation* Indian hunting and fishing rights. *Puyallup Tribe, supra; Antoine* v. *Washington, supra.* But even in regard to off-reservation rights there must be a factual showing of the necessity for restricting the Indian right rather than restricting the hunting and fishing privileges of others. See *Antoine* v. *Washington, supra,* 420 U.S. at 207. There has been no such showing here (Pet. App. 10–12).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

---

[3] The affidavit of Duncan Snell (Pet. App. 25–27), which petitioner filed with the Clerk and which concerns alleged fishing abuses on the Reservation after the decision of the court of appeal, may be relevant to future litigation or administrative action by the tribe or the United States, but it has no bearing on the issue of this case, which is whether the State acted within its authority in seizing respondent's nets in 1969. There is no evidence that respondent's fishing was in any way detrimental to conservation.

U.S. GOVERNMENT PRINTING OFFICE: 1976